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80-64

In the Supreme Court of the United States

October Term, 1979

No. .....

EDWIN R. EGBERT,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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June, 1980

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In the Supreme Court of the United States

October Term, 1979

No. .....

EDWIN R. EGBERT,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner, Edwin R. Egbert, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in this proceeding.

OPINION BELOW

The opinion of the Supreme Court of the State of Kansas is reported at 227 Kan. 266, 606 P.2d 1022 (1980). A copy of this opinion appears in Exhibit "A".

JURISDICTION

The opinion of the Kansas Supreme Court was entered on March 1, 1980, and Motion for Rehearing was timely filed and denied on April 9, 1980. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

1. Whether, where intent is an element of the crime charged, the jury instruction, "there is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true" violates the Fourteenth Amendment's guarantee of due process of law and requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution

Fourteenth Amendment:

> § 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

Statutes

Kansas Statutes Annotated, 21-3401:

> Murder in the first degree. Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

Kansas Statutes Annotated, 21-3402:

> Murder in the second degree. Murder in the second degree is the malicious killing of a human being, committed without deliberation or premeditation and not in the perpetration or attempt to perpetrate a felony.

Kansas Statutes Annotated, 60-402:

> Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

Kansas Statutes Annotated, 60-413:

> Definition. A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

Kansas Statutes Annotated, 60-414:

> Effect of presumptions. Subject to K.S.A. 416, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would

otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

STATEMENT OF THE CASE

Edwin R. Egbert was found guilty by a jury of murder in the second degree, in violation of K.S.A. 21-3402; a lesser included offense of the charged crime of first degree murder. He was sentenced to imprisonment for a term of not less than five years nor more than life.

The circumstances from which this charge evolved arose between the defendant and the victim, his wife, who were married in 1965 and had one child. As the defendant explained, marital problems had caused him to consider separating from his wife. On the evening of January 3, 1978, his wife left the home with a friend for the evening. After having been gone for a lengthy period of time, the couple's child became ill and defendant tried to locate his wife. He was unable to do so. Ed, being distraught over his inability to locate her, determined the time had arrived when he should leave the home. He packed his things and while preparing to wrap one of various rifles to take with him, his wife returned to the house. She put her purse on the floor and came toward the defendant. As she did, she tripped on the purse, fell, and grabbed the rifle. While pulling herself up, it lodged against her side and accidently discharged resulting in a fatal wound.

The State argued, of course, that the defendant intentionally and willfully killed his wife. To facilitate the argument, they requested the following instruction found in Pattern Instructions for Kansas:

> "There is a presumption that a person intends all the natural and probable consequences of his vol-

untary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."

Over the defendant's objection that such an instruction was improper and had the effect of shifting the burden of proof to the defendant to negate the element of intent and, therefore, proving his innocence, the Court gave the same.

An appeal was taken directly to the Kansas Supreme Court. A copy of the judgment of the Court appears in Exhibit "B". The questions presented to this Court were raised on appeal and rejected. Motion for Rehearing was denied on April 9, 1980 and appears in Exhibit "C".

REASON FOR GRANTING THE WRIT

A. THE DECISION BELOW CONFLICTS WITH THE FOURTEENTH AMENDMENT'S DUE PROCESS REQUIREMENT THAT THE STATE PROVE EVERY ELEMENT OF A CRIMINAL OFFENSE BEYOND A REASONABLE DOUBT AND FLIES SQUARELY IN THE FACE OF THIS COURT'S DECISION IN *SANDSTROM v. MONTANA*, ... U.S. ..... 61 L.Ed. 2d 39, 99 S.Ct. 2450 (1979).

This Court's unanimous decision in *Sandstrom v. Montana*, ... U.S. ..... 61 L.Ed. 2d 39, 99 S.Ct. 2450 (1979), held that, in a case in which intent is an element of the crime charged, the jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts," violates the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

The instant case involved a similar instruction with an additional provision added so as to supposedly eliminate the possibility of interpreting the presumption to be conclusive. The jury was charged that:

> "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."

Development of this instruction came from the form book used in Kansas known as Pattern Instructions For Kansas. In the case of *State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 (1973), the Supreme Court previously found that an instruction generally following the language of that given in the instant case, but leaving off the second sentence, was prejudicial error.[1] The instant instruction has been approved by the Kansas Supreme Court in several cases, the first being *State v. Lassley*, 218 Kan. 758, 545 P.2d 382 (1976).[2] *See also, State v. Woods*, 222 Kan. 179, 563 P.2d 1061 (1977).

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1. The instruction given was "you are instructed that the natural and probable consequences of every act deliberately done by a person of sound mind is presumed to have been intended by the author of such act." *State v. Warbritton, supra*, at 508. It was pointed out in that case that similar language had been approved by the Court in a number of cases and that the difference requiring a reversal in *Warbritton* was that the sole defense was a claim of no intent. The Court did not raise the question in a constitutional sense; rather, it was ruled that the circumstances required a finding of prejudicial error.

2. In *Lassley*, the Court said: "Defendant's final argument relates to the propriety of instructing the jury on the presumption of intent. The trial court, over defense counsel's objection, instructed the jury:

> " 'There is a presumption that a person intends all natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true.' (Instruction No. 10.). This is the instruction recommended in PIK Criminal 54.01.

(Continued on following page)

Subsequent to this Court's decision in *Sandstrom*, consideration of this instruction was first made by the Kansas Court of Appeals in the case of *State v. Acheson*, 3 Kan. App. 2d 705, 601 P.2d 375 (1979). There, in finding the instruction to be constitutionally valid, the Court of Appeals stated:

Footnote continued—

> Defendant does not question that this instruction is merely a restatement of a firmly established principle of law, long recognized and applied by the courts of this state. (*State v. Donahue*, 197 Kan. 317, 416 P.2d 287; *State v. Eye*, 161 Kan. 69, 166 P.2d 572; *State v. Thomas*, 157 Kan. 526, 142 P.2d 692). He contends, however, that the instruction creating a presumption of intent is in conflict with the mandate of K.S.A. 21-3201, which places upon the prosecution the burden of proving an act to be intentional. In other words, defendant argues that by instructing the jury that a person is presumed to intend all the natural and probable consequences of his voluntary acts, the court is switching the burden upon defendant to show they were unintentional.
>
> "The presumption that a person intends all the natural and probable consequences of his voluntary acts is rebuttable, and may be overcome by evidence to the contrary. (*State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152). This principle is consistent with the requirement that the prosecution prove the criminal intent. Intent is difficult, if not impossible, to show by definite and substantive proof. Thus, it is agreed that criminal intent may be shown by proof of the acts and conduct of the accused, and inferences reasonably drawn therefrom. We fail to see any conflict with the statutory burden placed on the state.
>
> ' "The propriety of the instruction given by the trial court is evident when the instructions are considered as a whole. This is especially true when the challenged instruction is read in conjunction with Instruction No. 9 which states:
>
> "The law places the burden on the State to prove that the defendant is guilty. The law does not require the defendant to prove his innocence. Accordingly you must assume the defendant is innocent unless you are convinced from a consideration of all of the evidence in the case that he is guilty." '
>
> The burden was properly placed on the state to prove defendant's guilt. The state was entitled to the presumption that defendant intended the natural and probable consequences of his acts and the trial court correctly instructed to that effect."
>
> *State v. Lassley*, at 762-63.

> As we read *Sandstrom*, it appears to us that it is permissible to require the defendant to come forth with some evidence so long as the jury is aware that the presumption is not conclusive and that the ultimate burden of persuasion on the issue of intent is not shifted to the defendant. See also, *Ulster County Court v. Allen*, ... U.S. ....., 60 L.Ed. 2d 777, 99 S.Ct. 2213 (1979). However, Montana Rules of Evidence 301(b)(2) requires the presumption at issue to be overcome by a preponderance of evidence contrary to the presumption, a burden greater than a permissive inference.
>
> The decision in *Sandstrom* will come as no surprise in this jurisdiction, for over six years ago the Kansas Supreme Court (*State v. Warbritton*, 211 Kan. 506, 506 P.2d 1152 [1973]) recognized the constitutional infirmity inherent in a 'conclusive presumption' intent instruction when it rejected a one-sentence instruction similar to the one used in *Sandstrom*. The instruction rejected in *Warbritton* was the first sentence of PIK Crim. 54.01. The trial judge refused to give the second sentence which reads, 'This presumption is overcome if you are persuaded by the evidence that the contrary is true.' Both sentences were given in the case at bar. Under the facts of this case, the second sentence eliminates any possibility that a reasonable jury could have interpreted the presumption as 'conclusive.' Thus the sole focus of constitutional scrutiny in this case is confined to determining whether the language could reasonably be interpreted by the jury to shift the burden of persuasion on the issue of intent from the State to the defendant.

Id. at 712-13.

This is important because the Supreme Court of Kansas, in hearing this appeal, relied on the decision of the lower Court of Appeals, adopted the reasoning used, affirmed the verdict and judgment of the trial court, and again placed their stamp of approval on the instruction given. They held that "the two sentence instruction given creates 'a permissive presumption and does not shift the burden of proof to the defendant,' as concluded by the Court of Appeals. (p. 715)." *State v. Egbert*, 227 Kan. 266, 606 P.2d 1022 (1980), at 267.

This analysis by the Kansas Courts is inadequate and incomplete. The highest court in the State of Kansas has apparently taken the position that Constitutional matters decided by this Court can be distinguished in cases where any slight difference of fact exists, without regard to the significance of those differences. Clearly, the instruction given in this case is such that a jury would probably consider it to be a mandatory shifting of the burden of proof, requiring the defendant to "overcome" the presumption given. At the very least, that possibility exists. And any adequate reading of this Court's decision in *Sandstrom* reveals that either of those possibilities constitutes a violation of the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The Kansas Supreme Court's attempt to distinguish this case, thereby exempting their prior approval of the instruction from this Court's scrutiny, cannot go unnoticed in light of *Sandstrom's* clear mandate to protect the defendant's Fourteenth

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3. It is clear from *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed. 2d 508 (1975), that shifting the burden to the defendant to prove that he lacks a certain requisite mental state is constitutionally deficient. And *Patterson v. New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed. 2d 281 (1977), reaffirmed that Kansas as well as any other state "must prove every ingredient of an offense beyond a reasonable doubt."

Amendment rights. This petition should be granted for review of the instruction given so as to clarify the difference between presumption and inference and to provide final recognition of this Court's supremacy in matters of Constitutional law over the Courts of the State of Kansas. It is not a matter to be left to state interpretation; rather, it involves an appellate court reluctant to subject its rulings and decisions to those of the Supreme Court of the United States. And only by the striking down of this instruction can the full and proper intent of *Sandstrom* be achieved.

When *Sandstrom* was decided, this Court took notice of various Montana statutes which exhibited the possibility that reasonable persons might believe the instruction there to be burden shifting.[4] However, in an interesting departure from sound judicial reasoning our appellate courts, while quick to point out the existence of the Montana statutes,[5] have ignored law in this State wherein generally, the same rules of evidence are applied. In pertinent part, K.S.A. 60-414 provided:

> ". . . if the facts from which the presumption is derived have any probative value as evidence of the

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4. Mont. Rev. Code § 93-1301-7 (1947) states that:

"[D]isputable presumptions . . . may be controverted by other evidence. The following are that kind:

'3. That a person intends the ordinary consequences of his voluntary act.' Montana Rules of Evidence 301 provides: '(b)(2) All presumptions, other than conclusive presumptions, are disputable presumptions and may be controverted. *A disputable presumption may be overcome by a preponderance of evidence contrary to the presumption. Unless the presumption is overcome, the trier of fact must find the assumed fact in accordance with the presumption.*'" (Emphasis added).

5. The reasoning used by the Court of Appeals in *Acheson* and adopted in the instant case pointed out the Montana rules of evidence requiring the presumption to be "overcome" by a preponderance of the evidence. *State v. Acheson, supra*, at 712. This, it was agreed, shifted the burden and had the effect of more than a "permissive inference."

existence of the presumed fact, the presumption continues to exist and the burden of establishing the non-existence of the presumed fact is upon the party against whom the presumption operates. . . ."[6]

The use of the word "overcome" in the instruction given indicates there is, at the very least, a mandatory presumption which must somehow be disproved. But, this State's own Rules of Evidence expressly provide the burden to prove the contrary is on the party against whom the presumption operates.

Our Court of Appeals and the Supreme Court seem to rely on their departure from *Sandstrom* by claiming it is permissible to require the defendant to come forth with some evidence so long as the jury is aware that the presumption is not conclusive and the ultimate burden is not shifted. In support of that conclusion, they cite the case of *Ulster County Court v. Allen,* ..... U.S. ..... 60 L.Ed. 2d 777, 99 S.Ct. 2213 (1979). Careful reading of the *Sandstrom* and the *Ulster County* cases fails to reveal to this writer any inference by this Court finding it permissible to require the defendant to produce evidence if there is any question about whether the ultimate burden of persuasion has been shifted or whether a reasonable juror might possibly interpret the instructions in such a manner. Petitioner has no quarrel with the fact that inferences can properly be drawn from certain proven facts, thereafter necessitating the presentation of evidence by a defendant to avoid an ultimate conviction. This

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6. K.S.A. 60-402

Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

is quite different, however, from a judicially granted presumption in favor of the State. The instruction given does not allow choice. The jury was not told "they might infer that conclusion." The instruction provides simply that there is a presumption that a person intends the natural and probable consequences of his voluntary acts. That presumption is required by K.S.A. 60-413 to be applied[7] and must be "overcome" by evidence to the contrary by the party against whom it operates. If the Courts of this State wanted to explain to the jury that an inference could be made from certain facts, that could have been done. But, instead, the jury was told the defendant must "prove" the non-existence of a fact (intent) which the state never had to prove in the first place since it had been awarded the gift of the presumption. This amounts to much more than the mere obligation to present evidence to rebut that which the state actually proves. Thus, while the Kansas Court admits the presence or absence of intent may be "impossible" to show by substantive proof,[8] they allow the state and jury to *presume* it was there and then require the defendant to *prove* its non-existence, knowing all the while that such proof can never be made. This is clearly beyond the bounds of the Fourteenth Amendment. *See Mullaney v. Wilbur, supra.*

At the same time, the State of Kansas has gone so far as to disapprove the instruction given here for further use. It seems extremely inconsistent to state that there is no problem with the instruction but then require the trial courts to deviate and clarify the instruction by the use of word inference rather than presumption. Thus,

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7. K.S.A. 60-413

Definition. A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

8. *State v. Lassley, supra*, at 762-63.

the Court of Appeals holding in *State v. Acheson,* that the instruction "can and should be altered to make it crystal clear that it is only a permissive inference leaving the trier of facts free to consider or reject it . . ." seems to be an admission that there is some question as to whether the instruction has that result. Their further warning that they "will not in the future approve PIK Crim. 54.01 if it is given in any proceeding tried more than fifteen days after the filing of this opinion," establishes their lack of confidence in their own opinion. The Supreme Court's approval of this warning makes clear the denial to this defendant of the Fourteenth Amendment's guarantee of due process of law.

The various decisions of certain courts throughout the Federal System in this country support the conclusions drawn by this petitioner and reject those of the appellate courts in this State. *United States v. Robinson,* 545 F.2d 301 (2nd Cir. 1976), examined a natural and probable consequence instruction. There, the court found the instruction to not only be burden shifting but specifically held that the addition of the phrase "unless the contrary appears from the evidence" made the instruction constitutionally deficient. Thus, it could not be found to be harmless beyond any reasonable doubt and the Court reversed the decision. It is argued that the better reasoning requires a determination similar to *Robinson* in this case and is what was intended by this Court in *Sandstrom.* This must be made crystal clear to the Supreme Court of the State of Kansas inasmuch as they have rejected any contention that their instruction could somehow be constitutionally defective. Thus, petitioner urges this Court to accept certiorari of this matter, allow the preparation of briefs and argument, and consider fully the apparent rejection by the Kansas Supreme Court of *Sandstrom v. Montana.*

CONCLUSION

For these reasons, the writ of certiorari should issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

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APPENDIX

EXHIBIT "A"

No. 50-186

STATE OF KANSAS,
Appellee,

v.

EDWIN R. EGBERT,
Appellant.

SYLLABUS BY THE COURT

(Received March 3, 1980)

In an appeal from a judgment of conviction of murder in the second degree, the record is examined and it is *held*: (1) the instructions given were adequate and properly stated the applicable rules for the jury; (2) evidence of which appellant complains was relevant, and was properly admitted; and (3) the trial court did not err in permitting the prosecution, on cross-examination, to ask the defendant to demonstrate how he contended the shooting occurred.

Appeal from Sedgwick district court, division No. 10; TYLER LOCKETT, judge. Opinion filed March 1, 1980. Affirmed.

Russell Shultz, of Shultz, Fry & Fisher, of Wichita, argued the cause, and *Craig Shultz,* of the same firm, was with him on the brief for the appellant.

Gregory L. Waller, assistant district attorney, argued the cause, and *Robert T. Stephan,* attorney general, *Vern Miller,* district attorney, *Stuart W. Gribble* and *Alan G. Metzger,* both assistant district attorneys, were with him

on the brief for the appellee. The opinion of the court was delivered by

MILLER, J.: This is a direct appeal in a criminal case by Edwin R. Egbert who was found guilty by a jury of murder in the second degree, K.S.A. 21-3402, as a lesser included offense of the charged crime of first degree murder. He was sentenced to imprisonment for a term of not less than five years nor more than life. He claims that the trial court erred in its jury instructions and in the admission of certain evidence.

The defendant and the victim, Janet Egbert, were married in 1965 and had one child who was 9 years old at the time of this tragedy. Marital problems had arisen. On the evening of January 2, 1978, Janet left the home about 6:30 o'clock p.m. with a friend, Debra Garner. They went to Debra's parents' house for dinner, then stopped at a local bar, the homes of some friends, and their place of employment, all for short visits. Meanwhile, the couple's minor child became ill, and defendant unsuccessfully tried to locate his wife. Moments after Janet returned home, about 11:30 o'clock p.m., she was shot in the back, resulting in her immediate death. Upon trial, the defendant contended that Janet stumbled over her purse, and in attempting to arise from the floor, she grabbed hold of defendant's loaded gun, which discharged accidentally.

Defendant first contends that the court erred in refusing to instruct the jury that intent to kill is a necessary and material element of murder in the second degree. The trial court instructed the jury in accordance with PIK Crim. 56.03, telling them that to establish a charge of murder in the second degree the following claims must be proved: that the defendant killed Janet Egbert; that such killing was done maliciously; and that the act was done on a certain day in Sedgwick County, Kansas. The trial

court followed this with the definition of "maliciously," following PIK Crim. 56.04, stating that "maliciously" means willfully doing a wrongful act without just cause or excuse. That was followed by a definition of "willfully," meaning conduct that is purposeful and intentional, and not accidental. Similar instructions were approved in *State v. Sparks,* 217 Kan. 204, 210, 535 P. 2d 901 (1975). The court need not put all of the instructions in one; definitions may properly be assembled and given in an orderly fashion. From a fair reading of the instructions given we are convinced that the jury could not have been misled. Murder in the second degree was properly defined and instructed upon.

Defendant next contends that the trial court erred in giving instruction 5 which followed PIK Crim. 54.01, as follows:

> "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."

Defendant contends that this instruction could have been interpreted by the jury as either a conclusive presumption on the issue of intent, or as a burden-shifting presumption, in violation of the rationale of *Sandstrom v. Montana,* ..... U.S. ....., 61 L.Ed. 2d 39, 99 S. Ct. 2450 (1979). Trial was held on May 9, 1978; *Sandstrom* was not decided until June 18, 1979. PIK Crim. 54.01 was discussed at length by our Court of Appeals in the light of *Sandstrom* in the recent case of *State v. Acheson,* 3 Kan. App. 2d 705, 601 P. 2d 375 (1979) and we need not repeat what was there said. We hold that the two-sentence instruction given creates "a permissive presumption and does not shift the burden of proof to the defendant," as concluded by the Court of Appeals. (p. 715.)

Defendant next contends that the trial court erred in refusing to instruct the jury that the State is required to negate accident by proof. Defendant proposed an instruction based upon what was said in *State v. Doyle,* 201 Kan. 469, 478, 479, 441 P. 2d 846 (1968). This issue is controlled adversely to the contentions of the defendant by our recent discussion of the subject in *State v. Henderson,* 226 Kan. 726, 732-733, 603 P. 2d 613 (1979). The jury was properly instructed on the State's burden to prove guilt beyond a reasonable doubt. We find no error.

Defendant next contends that the copies of the trial court's instructions which were submitted to the jury were incomplete in that instructions numbered 3 and 10, in the set of instructions which the judge filed with the clerk of the district court, were found to be blank pages. The reporter's notes conclusively show, and counsel admit, that all of the instructions were given orally to the jury. Also, counsel were given complete copies of the court's instructions for use during oral argument. Xeroxed copies were made of the instructions, and each juror was furnished with a set of instructions; whether those copies included instructions 3 and 10, or whether those two were omitted from the copies given to the jurors because of some malfunction of the copying machine or otherwise, is not disclosed by the record before us. There is no contention that the copy which was eventually filed with the clerk was one of the copies submitted to the jury. The appellant has the burden not only to show error, but to establish that the error resulted in substantial prejudice. Error is not presumed; the burden is upon the appellant to demonstrate it. In the absence of a record showing prejudicial error, an appellate court must assume that the action of the trial court was proper. See *State v. Holt,* 223 Kan. 34, 45, 574 P. 2d 152 (1977); *State v. Freeman,* 216 Kan. 653, 533 P. 2d 1236 (1975).

In the case before us there is no evidence from which this court can conclude that the copies of the instructions given to the jurors were incomplete. Accordingly, we find no error. The trial courts are not required by statute or rule to furnish separate instructions for each juror; ordinarily, the original set of instructions which the court reads to the jury is then handed to the jury for its use in the jury room. Either procedure is proper.

Finally, with regard to instructions, the defendant contends that the trial court erred in failing to instruct upon reasonable doubt, circumstantial evidence, surmise and speculation, character, and motive. The record indicates that the trial court instructed fully on the first three: reasonable doubt, circumstantial evidence, and surmise and speculation. While there were no explicit instructions regarding motive or character evidence, no separate and specific instructions on these subjects were required. The jury was instructed that they might consider as evidence whatever was admitted in the trial as a part of the record. We conclude that the instructions as a whole were fair, that they properly submitted the issues to the jury, and that they were free from prejudicial error.

Defendant next contends that the trial court erred by allowing the State to introduce a conversation which had been ruled inadmissible in a *Jackson v. Denno* hearing. At that hearing the court ruled that a statement to the effect that "[j]ealousy is a terrible thing," made by the defendant to officers after he had been given the *Miranda* warnings, was admissible. The State used that statement during cross-examination of the defendant. In response to questioning about that statement, the defendant responded that he had told the officers, "Don't ever let your wives go to work." Apparently defendant had made a similar statement to the officers during questioning, which statement the court had ruled inadmissible at the *Jackson v.*

Denno hearing. The State, in its questioning of the defendant before the jury, did not violate the trial court's *Jackson v. Denno* ruling. We find no error.

Defendant next contends that the court erred in admitting testimony which was too remote to be relevant. The testimony in question was given by Don Liming, who was employed at the same store in which Janet worked; they frequently rode to and from work together. Liming testified in substance that in November, some six weeks before Janet's death, the defendant accused Liming of having an affair with Janet; defendant threatened to split Liming's head open; and he told Janet to pack up her clothes and leave. On the fatal night defendant called Liming and inquired as to Janet's whereabouts; Liming had not seen her that evening; defendant said that Janet's clothes would be on the front porch when she returned. Though there was testimony that defendant and his wife had patched things up after the November occurrence, we cannot say that the testimony was not relevant. It has some probative value in determining motive. Under our rules of evidence, K.S.A. 60-407 (*f*), all relevant evidence is admissible. The prosecutor alluded to this evidence in his opening statement, and thus it did not come as a surprise to the defendant when the testimony was elicited. The trial court did not abuse its discretion under K.S.A. 60-445 in admitting this evidence.

Finally, defendant contends that the trial court erred in permitting the prosecutor, during cross-examination of the defendant, to ask the defendant to demonstrate to the jury how he contended Janet was shot, and in permitting the prosecutor to demonstrate the defendant's version during closing argument. Defendant cites no authorities for his objection to this demonstration. In *State v. Robinson*, 516 S.W. 2d 40 (Mo. App. 1974), the prosecution asked the defendant to demonstrate the position of

the parties during the fatal scuffle in accordance with his prior testimony on direct examination. The Court of Appeals held that this was within the scope of direct testimony and did not violate the defendant's guarantee of freedom from self-incrimination. For similar cases where demonstrations made by defendant as a witness were held admissible, see Annot., Evidence - Re-enactment of Crime, 100 A.L.R. 2d 1257, 1261. The re-enactment here requested was simply to demonstrate how defendant contended the shooting occurred. The defendant had testified in detail as to the occurrence during his direct testimony. The requested re-enactment was not beyond the scope of defendant's direct testimony and did not violate his constitutional guarantee against self-incrimination. It constituted a proper part of his cross-examination. We find no error.

The judgment of conviction is affirmed.

EXHIBIT "B"

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

Case No. 78 CR 6
Division No. 10

THE STATE OF KANSAS,
Plaintiff,

vs.

EDWIN R. EGBERT,
Defendant.

JOURNAL ENTRY OF JUDGMENT

(Certificate of Clerk, June 2, 1978)

ON this 24th day of April, 1978, this matter comes regularly on for trial on the Information charging the defendant with First Degree Murder, contrary to K.S.A.

21-3401(a). The State appears by its attorney, Gregory L. Waller, Assistant District Attorney and Vern Miller, District Attorney, and the defendant appears in person and with his attorneys, Russell Shultz and William Fry.

THEREUPON, a jury is duly impaneled and sworn to try the matter. Both sides present their evidence and rest.

THEREAFTER, on the 8th day of May, 1978, the matter having been continued from court day to court day throughout the trial, the jury having heard the evidence, the instructions of the Court and the arguments of counsel and having duly deliberated, returned the following verdict:

> "We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty of murder in the second degree.
>
> Date of this verdict 8 May, 1978 /s/ B.A. Bartley
> Foreman."

THEREUPON, the jury was polled, the Court accepted the verdict of the jury and dismissed the jury and set the matter for hearing on the motion for new trial and/or sentencing to the 26th day of May, 1978.

THEREAFTER, on the 26th day of May, 1978, this matter came on for hearing on the defendant's Motion for New Trial and Acquittal filed herein. The Court, after hearing the arguments of counsel and being duly advised in the premises, finds that said motion should be and the same is hereby overruled.

The Court then inquired of the defendant if had any legal cause to show why judgment should no be pronounced against him, and the defendant, failing to show any such cause, and none appearing, the Court proceeded to pro-

nounce judgment of sentence against the defendant as follows:

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant be committed to the custody of the Secretary of Corrections for a period of not less than five (5) years nor more than life imprisonment on the charge, Second Degree Murder, contrary to K.S.A. 21-3402 and in accordance with K.S.A. 21-4501(b) and that he pay the costs of this action.

The Court specifically finds that, pursuant to K.S.A. 21-4618, the defendant used a firearm in the commission of the offense for which he stands convicted herein.

IT IS FURTHER ORDERED that the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies, upon receipt of two certified copies of this judgment and commitment from the Clerk of this Court, transport the above-named defendant to the custody of the Secretary of Corrections to serve the sentence imposed upon him by this Court and that he make due return thereon.

IT IS SO ORDERED.

/s/ Tyler C. Lockett
Judge Tyler C. Lockett

APPROVED:

/s/ Gregory L. Waller
Gregory L. Waller
Assistant District Attorney

.....
Attorney for Defendant

EXHIBIT "C"

IN THE
SUPREME COURT OF THE STATE OF KANSAS

No. 50,186

STATE OF KANSAS,
Appellee,

vs.

EDWIN R. EGBERT,
Appellant.

(Received April 11, 1980)

You are hereby notified of the following action taken in the above entitled case:

Motion for Rehearing.

DENIED.

Yours very truly,

Lewis C. Carter
Clerk, Supreme Court

Date April 9, 1980

Supreme Court, U.S.
FILED
SEP 29 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 80-64

EDWIN R. EGBERT,

Petitioner,

vs.

STATE OF KANSAS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

ROBERT T. STEPHAN
Attorney General of Kansas
Topeka, Kansas

PATRICK L. CONNOLLY
Assistant District Attorney
18th Judicial District of Kansas
535 North Main
Wichita, Kansas 67203

Counsel for Respondent

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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 80-64

EDWIN R. EGBERT,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

NATURE OF THE ACTION

The petitioner, Edwin R. Egbert, was convicted by a jury of murder in the second degree, K.S.A. 21-3402, as a lesser included offense of the charged crime of first degree murder, K.S.A. 21-3401. The Kansas Supreme Court affirmed petitioner's conviction on March 1, 1980 in State v. Egbert, 227 Kan. 266 ___ P.2d ____ (1980), (Appendix A 1 of Petition for Writ of Certiorari). Petitioner seeks to invoke the jurisdiction of this Court

pursuant to 28 U.S.C. 1257(3); in support thereof, petitioner erroneously contends that the judgment of the Supreme Court of Kansas is in conflict with decisions of this Court.

QUESTIONS PRESENTED

Whether the decision below was proper under Sandstrom v. Montana, __ U.S. ____61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) and was not violative of defendant's due process rights requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION

Fourteenth Amendment:

§1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATUTES

Kansas Statutes Annotated, 21-3401:

Murder in the first degree. Murder in the first degree is the killing of a human being committed maliciously, willfully, deliberately and with premeditation or committed in the perpetration or attempt to perpetrate any felony.

Kansas Statutes Annotated, 21-3402:

Murder in the second degree. Murder in the second degree is the malicious killing of a human being, committed without deliberation or premeditation and not in the perpetration or attempt to perpetrate a felony.

Kansas Statutes Annotated, 60-402:

Scope of rules. Except to the extent to which they may be relaxed by other procedural rule or statute applicable to the specific situation, the rules set forth in this article shall apply in every proceeding, both criminal and civil, conducted by or under the supervision of a court, in which evidence is produced.

Kansas Statutes Annotated, 60-413:

Definition. A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action.

Kansas Statutes Annotated, 60-414:

Effect of presumptions. Subject to K.S.A. 4-6, and except for presumptions which are conclusive or irrefutable under the rules of law from which they arise, (a) if the facts from which the presumption is derived have any probative value as evidence of the existence of the presumed fact, the presumption continues to exist and the burden of establishing the nonexistence of the presumed fact is upon the party against whom the presumption operates; (b) if the facts from which the presumption arises have no

probative value as evidence of the presumed fact, the presumption does not exist when evidence is introduced which would support a finding of the nonexistence of the presumed fact, and the fact which would otherwise be presumed shall be determined from the evidence exactly as if no presumption was or had ever been involved.

STATEMENT OF THE CASE

In the early evening hours of January 2, 1978, Janet Egbert was picked up by a girlfriend for an evening of entertainment. They proceeded to the girlfriends's parent's home for dinner, then to a local bar for a beer, and later visited the homes of a couple of acquaintances.

Around midnight, Janet was taken back home. Inside the residence, Janet Egbert's

husband, Edwin Egbert, had been waiting. His open, unfounded jealousy over the previous several months and his uncontrolled fit of rage that night culminated in his shooting Janet Egbert in the back, resulting in her death.

Earlier that evening the defendant, Edwin Egbert, had become interested in the whereabouts of his wife, made several phone calls and excursions searching for her. A search for Janet being frustrated, defendant flew into a fit of rage and prepared for his wife's return home. The defendant testified that he was upset when he could not find his wife and as a result thereof went into an uncontrolled fit of rage. He threw their marriage certificate on the floor, broke the glass out of the frame, and tore the license

up into pieces. He proceeded to strike the wall with a cane, breaking the cane and indenting the wall. He then got out and loaded some of his rifles and shotguns. He then turned out the lights and waited.

When officers arrived on the scene, they found articles of clothing scattered about, broken glass, overturned furniture, and the body of Janet Egbert.

Janet Egbert died from a gunshot wound to the upper right back that entered from behind. The untimely death of Janet was not the result of an accident, but rather the end result of defendant's unfounded jealousy and uncontollable anger that had begun several months prior to the murder. The defendant did not stay at the house that evening and explain the circumstances of the death, rather concealed the weapons used, went and got money from friends, and left the city.

The defendant eventually ran out of gas near Winfield, Kansas, and when he attempted to get gas from a local farmer, the farmer called the local sheriff who responded and took the defendant into custody.

The defendant's story was that the victim had come home while he was preparing to pack his items of clothing, including his guns, and leave the house. When she came home, she set her purse down on the floor, subsequently tripping over it and falling, though the purse was located several feet from the body of the victim. The defendant further testified that the victim attempted to pull herself up from the floor by grabbing the barrel of the gun; whereupon, it went off, striking her and killing her.

He maintains this story despite the fact that there were no nitrates present on the clothing of the deceased and that the shot must have been from a distance of greater than 12 inches. As demonstrated by the defendant and the prosecutor during the course of cross-examination, the location of the entrance and exit wounds make the occurrence of the shooting as the defendant describes it impossible.

The defendant was ultimately charged with first degree murder, and convicted by jury of second degree murder. At trial the state requested and the trial court granted the following instruction found in Pattern Instructions for Kansas 54.01:

> There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true.

Defendant appealed his conviction to the Kansas Supreme Court citing as error the giving of the instruction by the lower court. The conviction was affirmed and the instruction (supra) was held to be proper.

REASON FOR DENYING WRIT

The decision below was proper under Sandstrom v. Montana, __U.S. ____, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979) and was not violative of defendant's due process rights requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

In Sandstrom v. Montana, ___U.S. ____, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979), this court held that in a case in which intent is an element of the crime charged, the single-sentence jury instruction, "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates the Fourteenth Amendment requirement that the state prove every element of a criminal offense beyond a reasonable doubt.

While the instant case involves a somewhat similar instruction, there is a significant distinction to be drawn between the Kansas instruction and the instruction held to be unconstitutional in Sandstrom v. Montana, ___U.S. ___, 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979).

In Sandstrom, the Montana instruction which this court held unconstitutional was a single-sentence instruction:

> The law presumes that a person intends the ordinary consequences of his voluntary acts.

This Court held that:

> A reasonable jury could well have interpreted the presumption as "conclusive," that is, not technically as a presumption at all, but rather as an irrebuttable direction by the court to find intent once convinced of the facts triggering the presumption. Alternatively, the jury may have interpreted the instruction as a direction to find intent upon proof of the defendant's voluntary action (and their "ordinary" consequences), unless the defendant proved the contrary by some quantum of proof which may well have been considerably greater than "some" evidence -- thus effectively shifting the burden of persuasion on the element of intent. Numerous federal and state courts have warned that instructions of the type given here can be interpreted in just these ways. See generally . . . State v. Warbritton, 211 Kan. 506, 509, 506 P.2d 1152, 1155 (1973).

Sandstrom cites a number of cases throughout the country (Warbritton, included) that have recognized a constitutional infirmity with the single-sentence instruction on intent. The Kansas Supreme Court in Warbritton held as prejudicial error the giving of the one-sentence instruction stating that (emphasis added):

> In the instant case the defendant's sole defense was his claim of no intention to injure. His only evidence was his own testimony to that effect. The effect of the instruction as given would be to foreclose any consideration by the jury to defendant's testimony serving to rebut the presumption stated in the instruction given. The presumption is rebuttable and may be overcome by evidence to the contrary. (Vol. 1 Wharton's Criminal Evidence [13th Ed.] 134, p.222). It is not a conclusive presumption in the sense that it is a rule of substantive law which applies regardless of facts and which cannot be contradicted by evidence to the contrary. Under the circumstances present, we believe the failure to instruct as requested is prejudicial error.

The Kansas court recognized the constitutional ramifications of the one-sentence instruction since 1973, and has required the trial courts, when applying the instruction regarding criminal intent, to use the complete instruction regarding criminal intent, and to use the complete instruction as set out in Pattern Instructions for Kansas 54.01 (infra).

In the instant case, upon which the petition for Writ of Certiorari is based, the Kansas Supreme Court set out the pertinent distinction to be drawn to Sandstrom. Citing the relevant portion of State v. Egbert, 227 Kan. 266, ___P.2d _____ (1980) the Kansas Supreme Court held:

Defendant next contends that the trial court erred in giving instruction 5 which followed P.I.K. Crim. 54.01, as follows:

> "There is a presumption that a person intends all the natural and probable consequences of his voluntary acts. This presumption is overcome if you are persuaded by the evidence that the contrary is true."

Defendant contends that this instruction could have been interpreted by the jury as either a conclusive presumption on the issue of intent, or as a burden-shifting presumption, in violation of the rationale of Sandstrom v. Montana, . . . U.S. ..., 61 L.Ed.2d 39, 99 S.Ct. 2450 (1979). Trial was held on May 9, 1978; Sandstrom was not decided until June 18, 1979. PIK Crim. 54.01 was discussed at length by our Court of Appeals in the light of Sandstrom in the recent case of State v. Acheson, 3 Kan. App.2d 705, 601 P.2d 375 (1979) and we need not repeat what was there said. We hold that the two-sentence instruction given creates "a permissive presumption and does not shift the burden of proof to the defendant," as concluded by the Kansas Court of Appeals. (p. 715.)

Based on the distinction drawn by the Kansas Supreme Court regarding the two instructions and the fact that Egbert was tried nearly one year prior to Sandstrom, the state would respectfully request that the petition for writ of certiorari be denied.

Additionally, the State of Kansas supports wholeheartedly the separate concurring opinion in Sandstrom of Mr. Justice Rehnquist, with whom the Chief Justice joins in holding:

> I am loath to see this Court go into the business of parsing jury instructions given by the state trial courts, for as we have consistently recognized, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 147, 38 L.Ed.2d 368, 94 S.Ct. 396 (1973).

CONCLUSION

For these reasons, it is respectfully submitted that the writ of certiorari should not issue to review the judgment and opinion of the Supreme Court of the State of Kansas.

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Very respectfully submitted,

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IN THE SUPREME COURT FOR THE UNITED STATES

EDWIN R. EGBERT, Petitioner,	)	
vs.	)	Case No. 80-64
STATE OF KANSAS, Respondent.	)	CERTIFICATE OF SERVICE

This is to certify that a copy of the Brief in Opposition was mailed, first class postage prepaid, to Russell Shultz, 1333 North Broadway, Suite C, Wichita, Kansas 67214, Counsel for Petitioner, and to Tom Haney, Assistant Attorney General, Kansas Judicial Center, 301 West 10th Street, Topeka, Kansas 66612, on the 12th day of September, 1980.

Vern Miller

VERN MILLER
District Attorney
Counsel for Respondent